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IN THE

Supreme Court of the United States

October Term,
1966

No. _____

HARRY S. KRAKOFF, ADMINISTRATOR OF THE ESTATE OF WILLIAM F. DONNELL,
Plaintiff-Appellant,

vs.

PAUL RUBLE WEAVER, ET AL., MICHIGAN MUTUAL LIABILITY CO.,
Defendants-Appellees.

Appeal From The Supreme Court of the State of Ohio

OPINIONS

The opinion of Judge Marshall of the Court of Common Pleas of Franklin County, Ohio, striking the supplemental petition of this appellant was filed July 8, 1965, attached hereto as Appendix "A." The Court of Appeals of Franklin County, Ohio, affirmed the judgment by per Curiam opinion on March 1, 1966, attached hereto as Appendix "B." None of these opinions is reported. The Ohio Supreme Court dismissed the appeal as of right September 21, 1966, reported at 39 Ohio Bar, No. 25 Entries. Motion for rehearing was filed October 3, 1966, in the Supreme Court of the State of Ohio. Motion for rehearing was overruled on the 26th day of October, 1966, by the Ohio Supreme Court.

JURISDICTION

The notice of appeal to this Court was filed in the Supreme Court of the State of Ohio on January 26, 1967.

The jurisdiction in this Court rests on 28 U.S.C. Section 1257 (2):

"1257. State Courts — Appeal — Certiorari — Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

This court has Jurisdiction to hear an appeal testing the Constitutionality of state statutes which are repugnant to the Constitution and the laws of the United States in that they deny a citizen his day in Court or an opportunity to be heard in a court of law upon a question involving his rights or interests thus denying to him a judicial determination of his rights.

This court has jurisdiction to hear an appeal testing the constitutionality of state statutes abridging the Fourteenth Amendment of the Constitution of the United States by depriving a citizen of his property without due process of law.

CASES BELIEVED TO SUSTAIN THE JURISDICTION:

316 U.S. 491 Standard Oil Co. of California vs Johnson, Treas. of California

333 U.S. 507 Winters vs New York

235 U.S. 164 Louisiana Railway & Navigation Co. vs Behrman, Mayor of the City of New Orleans

172 U.S. 279 Columbus Water Company vs Columbia Electric Street Railway Light & Power Company

280 U.S. 376 Lawrence et al. vs State Tax Commission of Mississippi

318 U.S. 413 Sargent vs. Texas

CONSTITUTION OF THE UNITED STATES:

Amendment XIV of the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES OF OHIO INVOLVED:

Revised Code Sec. 3929.06 Liability of insurance company for bodily injury or death. (GC Sec. 9510-3)

Whenever a loss or damage occurs on account of a casualty covered by a contract of insurance made between an insurance company and any person, firm, or corporation, by which contract such person, firm, or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such person, firm, or corporation is responsible, the liability of the insurance company is absolute, and the payment of said loss does not depend upon the satisfaction by the assured of a final judgment against him for loss, damage, or death occasioned by such casualty.

No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after said assured has become responsible for such loss, damage, or death, and any such cancellation or annulment is void.

Revised Code Sec. 3929.06 Insurance money applied to judgment. (GC Sec. 9510-4)

Upon the recovery of a final judgment against any firm, person, or corporation by any person, including administrators and executors, for loss or damage on

account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, or for loss or damage to a person on account of bodily injury to his wife or minor child or children, if the defendant in such action was insured against loss or damage at the time when the rights of action arose, *the judgment creditor or his successor in interest* is entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment. If the judgment is not satisfied within thirty days after it is rendered, *the judgment creditor or his successor in interest*, to reach and apply the insurance money to the satisfaction of the judgment, *may file a supplemental petition in the action in which said judgment was rendered*, in which the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action.

Revised Code Sec. 2307.25 Effect of Marriage, death, or transfer of interest. (GC Sec. 11261)

An action shall not abate by the marriage of a female who is a party, but if it is necessary that her husband be joined therein, he may be made a party with her. Upon the disability of a party, the court may allow the action to continue by or against his representative, or successor in interest. No order shall be made for the continuation of an action for the recovery of money, pending at the death of the defendant, except upon motion, of which written notice shall be given to the executor or administrator within the time provided for the presentation of claims by creditors in section 2117.06 of the Revised Code. On any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him.

Revised Code Sec. 2311.25 Revivor of abated action. (GC Sec. 11401)

If before judgment, one of the parties to an action dies, or his powers as a personal representative cease, but the right of action survives in favor of or against his representatives or successors, the action may be revived and the action proceed in the name of such representatives or successors.

Revised Code Sec. 2311.26 Revivor by appearance or supplemental pleading. (GC Sec. 11402)

A revivor may be effected by the court, or a judge thereof in vacation, by allowing a motion of the representative or successor in interest to become a party to the action, or by supplemental pleading alleging the death of the party, and naming his representative or successor in interest upon whom service may be made as in the commencement of an action. *The limitations contained in sections 2311.27 to 2311.37, inclusive, of the Revised Code, do not apply to this section,* except as provided in section 2311.31 of the Revised Code.

Revised Code Sec. 2311.27 Revivor by conditional order. (GC Sections 11403, 11404)

A revivor may be effected by a conditional order of the court, if made in term, or by a judge thereof, if in vacation, that the action be revived in the name of the representative or successor of the party who died, or whose powers ceased, and proceed in favor of or against him.

Such order may be made on the motion of the adverse party, or of the representative or successor, of the party who died, or whose powers ceased, suggesting his death, or the cessation of his powers, which, with the name and capacities of his representatives or successor, shall be stated in the order.

Revised Code Sec. 2311.30 Revival of Action on death of plaintiff. (GC Sec. 11407)

Upon the death of the plaintiff the action may be revived in the name of his representatives to whom his right has passed. If his right has passed to his personal representative, the revivor shall be in his name; and if to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.

Revised Code Sec. 2311.34 Limitation when plaintiff dies. (GC Sec. 11411)

An order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made, of right, without the consent of the defendant, after the expiration of one year *from the time it might first have been made.* When the powers of the defendant have ceased, the order of revivor may be made in the period limited in section 2311.33 of the Revised Code.

Revised Code Sec. 2325.18 Limitation. (GC Sec. 11648)

An action to revive a judgment can only be brought within twenty-one years from the time it became dormant, unless the party entitled to bring such action, at the time the judgment became dormant, was within the age of minority, of unsound mind, or imprisoned, in which cases the action may be brought within fifteen years after such disability is removed.

Revised Code Sec. 2325.19 New parties to and revivor of judgment on death of party. (GC Sec. 11649)

In case of the death of either or both parties after judgment rendered, and before its satisfaction, his or their representatives may be made parties to the judgment, and it may be revived by an action brought for that purpose, or they may be made parties thereto in the manner prescribed for the revival of actions before judgment. Such judgment may be rendered and execution awarded as might or should have been given or awarded against the representative of such deceased party.

Revised Code Sec. 2325.20 Judgment remanded for execution by court of common pleas may be revived. (GC Sec. 11650)

When a judgment or decree has been rendered in the court of appeals and a mandate directed to the court of common pleas to carry it into execution, on the death of either or both parties thereto before its satisfaction, it may be revived in such court of common pleas in conformity with section 2325.19 of the Revised Code.

QUESTION PRESENTED BY THIS APPEAL

I. Whether the Statute, Ohio Revised Code Sec. 2311.34 is repugnant to the United States Constitution because:

(A) It is ambiguous, particularly in the phrase "one year from the time it might first have been made." In that the event is not set out to define the time from which the one year limitation should commence.

(B) The language of the Statute is vague.

(C) The interpretation that the courts of Ohio give this Statute results in a citizen being deprived of his property without a day in court, or without a judicial determination of his right.

II. Whether the Ohio Statutes Revised Code Sec. 3929.05 and Sec. 3929.06 have been nullified by the Supreme Court of the State of Ohio in upholding the lower courts' rulings denying this appellant a judicial determination of his rights thereby violating the Fourteenth Amendment of the United States Constitution because:

(A) The judgment creditor's successor in interest has been denied the right to enforce the contract of insurance by having it applied to the satisfaction of his judgment as guaranteed to him under Ohio Revised Code Sec. 3929.06.

(B) The appellant's right to proceed by Supplemental Petition as granted under Ohio Revised Code Sec. 3929.06 has been denied by permitting Ohio Revised

Code Sec. 2311.34 to prevail, in as much as, Ohio Revised Code Sec. 2311.34 conflicts with Ohio Revised Code Sec. 3929.06.

III. Whether appellant was denied due process of law under the Fourteenth Amendment of the Constitution of the United States by the Ohio Courts' total disregard of Ohio Revised Code Sections 2311.26, 2311.27, 2311.30, 2307.25 and 2325.19 because:

(A) All of the above numbered Sections provide for the successor in interest to proceed without limitation of time.

(B) By applying Section 2311.34 of the Ohio Revised Code in such manner as to defeat the rights as granted under Ohio Revised Code Sections 2311.26, 2311.27, 2311.30, 2307.25 and 2325.19.

STATEMENT OF THE CASE

I

William F. Donnell recovered a default judgment vs. Paul R. Weaver for personal injuries arising out of an automobile accident in Franklin County Court of Common Pleas On November 1, 1960.

II

On January 6, 1961, William F. Donnell filed a supplemental petition against Michigan Mutual Liability Company who insured Paul Ruble Weaver. Pursuant to Section 3929.06 of the Revised Code.

III

Thereafter, William F. Donnell died on the 24th day of December, 1961. His death was not discovered by the parties to this action until the 23rd day of October, 1963. On the 18th of December, 1963, Harry Krakoff was appointed administrator of William F. Donnell's estate.

IV

On the same day of his appointment, the 18th of December, 1963, said administrator filed a motion to revive the action in his name as successor.

V

This motion was overruled on the ground that more than one year had passed and that under section 2311.34 of the Revised Code the action could not be revived without the consent of the defendant. Harry Krakoff, Administrator, filed his appeal in the Court of Appeals, and the judgment of the Common Pleas Court was affirmed. See trial judge's opinion, Appendix "C".

VI

Harry Krakoff, Administrator, filed his motion to certify in the Supreme Court of Ohio. Said case is numbered 39341.

The Ohio Supreme Court overruled the motion to certify on May 19, 1965. The first appeal was predicated on the refusal of the court to allow substitution of party plaintiff.

VII

On June 3, 1965, Harry Krakoff, Administrator, filed a supplemental petition as provided for, under Ohio Revised Code Sec. 3929.06.

On July 8, 1965, Judge Marshall, Common Pleas Court, Franklin County, Ohio, ordered this supplemental petition be stricken from the files on the ground that it was in violation of the previous order of the Common Pleas Court of Franklin County for the reason as shown by the Journal Entry. See Appendix "A".

VIII

On July 31, 1965, the Administrator filed his Notice of Appeal to the Court of Appeals from the decision rendered

July 8, 1965. The Court of Appeals affirmed the lower court's judgment on March 24, 1966, giving the following reasons in its opinion. See Appendix "B".

IX

On May 2, 1966, Notice of Appeal was filed in the Supreme Court of the State of Ohio.

On September 21, 1966, the Supreme Court of the State of Ohio refused to certify.

Motion for rehearing was filed on the 3rd day of October, 1966.

On October 26, 1966, motion for rehearing was denied by the Supreme Court of the State of Ohio.

X

Notice of Appeal to the United States Supreme Court was filed on the 24th day of January, 1967, in the Supreme Court of Ohio.

SUMMARY OF ARGUMENT

We submit that Ohio Revised Code section 2311.34 is ambiguous: What does "one year from the time it might first have been made" mean? One year from the date of death? or one year from the date a successor or representative has been appointed?

In many cases the exact date of death is not determinable; men killed in combat—persons lost or missing—accidents that are not discovered until many days later— people living alone and found dead.

Wouldn't it be more logical and equitable to interpret the phrase "From the time it might first have been made" to mean that all the necessary elements were there for proceeding with court action, before the one year limitation can begin to run.

If the date of the appointment of a successor or representative is not the time for the one year limitation to begin to run, *certainly the date of the discovery of the death would have to be taken into account.*

We submit that the revivor action by motion could not have been filed until after the appointment of the administrator. The administrator was appointed on the 18th day of December, 1963, and brought the substitution proceedings on the same day of his appointment. Therefore Ohio Revised Code section 2311.34 is not applicable. To sustain the lower court's decision would deprive the administrator from his day in court and from a judicial determination of his rights.

We submit that the Ohio Statutes Revised Code Sec. 3929.05 and Sec. 3929.06 have been nullified by the Supreme Court of the State of Ohio in upholding the lower courts' rulings denying this appellant a judicial determination of his rights thereby violating the Fourteenth Amendment of the United States Constitution.

The administrator as the representative of the decedent has an absolute right to file his petition against the defendant, the Michigan Mutual Liability Company, in this case.

The Court of Appeals says that Ohio Revised Code 3929.06 is not to be used when plaintiff dies, by the personal representative when the statute specifically states that such representative may enforce a judgment against the insurance company, if in fact, the insurance company was contractually bound to pay for personal injury or property damage when the injury or damage occurred.

Res adjudicata cannot be applied in this case.

In order to invoke the Doctrine of Res adjudicata, the litigation must be on the merits.

The opinion of the Court of Appeals specifically states that there was no decision made in this case on the merits. See Appendix "B".

We submit that appellant was denied due process of law under the Fourteenth Amendment of the Constitution of the United States by the Ohio Courts' total disregard of Ohio Revised Code Sections 2311.26, 2311.27, 2311.30, 2307.25 and 2325.19.

The Court, by refusing to reverse and remand, will be providing the defendant insurance company with a judicial barrier which will allow it immunity against the very obligations they have contracted to perform.

CONCLUSION

It is a fundamental doctrine of the law that a party to be affected by a personal judgment must have a day in court, or an opportunity to be heard. In this connection, it is sometimes declared broadly that every man is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interests, before he is affected by any judicial decision on the question. The judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

This appeal, therefore, presents extraordinary and substantial constitutional questions which should be ruled upon by this Court.

Respectfully submitted,

LENA C. HARTWELL,

THELMA C. FURRY

Attorneys for Plaintiff-Appellant

APPENDIX "A"

No. 207,323

COURT OF COMMON PLEAS FRANKLIN COUNTY, OHIO

HARRY S. KRAKOFF, ADM. ESTATE OF WM. F. DONNELL,
Plaintiff,

vs.

PAUL RUBLE WEAVER AND MICHIGAN MUTUAL LIABILITY CO.,
Defendants.

Rendered this 8th day of July, 1965

MARSHALL, J.

HEARD ON MOTION OF DEFENDANT, MICHIGAN MUTUAL LIABILITY COMPANY, FOR AN ORDER STRIKING FROM THE FILES THE SUPPLEMENTAL PETITION FILED HEREIN ON JUNE 3, 1965.

Plaintiff has filed no memorandum contra said motion.

On May 19, 1964, Judge Holden by entry refused to permit a reviver of this case in the name of the Administrator of the estate of William F. Donnell, the original plaintiff, who died on December 24, 1961. This order was appealed to the Court of Appeals in Case No. 7789 in that court.

On December 22, 1964, that court rendered a per curiam opinion, sustaining the final order of Judge Holden of May 19, 1964, and dismissing the appeal of plaintiff.

The filing of the Supplemental Petition on June 3, 1965, was in violation of the order of Judge Holden. It is hereby ordered stricken from the files as we sustain the said Motion to strike.

GEORGE B. MARSHALL,
Judge

APPEARANCES:
LEDA HARTWELL,
Attorney for Plaintiff,
VORYS, SATER, SEYMOUR AND PEASE,
Attorneys for Appellee,
Michigan Mutual Lia. Co.

APPENDIX "B"

No. 8175

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

WILLIAM F. DONNELL,

Plaintiff-Appellant,

vs.

PAUL RUBLE WEAVER,

Defendant-Appellee.

DECISION

Rendered on March 1, 1965

MRS. LEDA C. HARTWELL,
3931 East Main Street,
Columbus, Ohio,
For Plaintiff-Appellant.
VORYS, SATER, SEYMOUR & PEASE,
MR. JAMES O. SEYMOUR,
52 East Gay Street,
Columbus, Ohio,
For Defendant-Appellee
Michigan Mutual Liability Co.

PER CURIAM.

This cause has been before this court upon a previous occasion at which time the court held that the trial court acted properly in refusing to allow a revivor of the action substituting as a party the personal representative for the deceased plaintiff. The holding was predicated upon the authority of Sections 2311.26 and 2311.34, Revised Code.

Subsequently, the Administrator of the Estate of William F. Donnell, Harry S. Krakoff, filed a supplemental petition

in the same numbered cause relying upon the provisions of Section 2305.19, Revised Code. The trial court sustained a motion to strike the pleading from the file made by the defendant, Michigan Mutual Liability Co., which is the final order from which this appeal is taken.

The basic fact to be emphasized in the present appeal is that appellant's decedent brought an action under Section 3929.06, Revised Code, which action is against the defendant, Michigan Mutual, and the bringing of that action precludes a separate and distinct action by the personal representative. It can be said that the original petition is still pending. The action has not failed "other than on the merits." The thing that happened was that the plaintiff died while the suit was pending, making an action for revivor under Section 2311.30, Revised Code, the only possible route to follow. Section 3929.06, Revised Code, is, therefore, not applicable.

The final order of the trial court is sustained and the appeal dismissed at appellant's costs.

BRYANT, P.J., DUFFEY and TROOP, JJ., concur.

IN

APPENDIX "C"

No. 207,323

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

WILLIAM F. DONNELL,

Plaintiff,

vs.

PAUL RUBLE WEAVER, ET AL,,

Defendants.

DECISION

Rendered this 5th day of May, 1964.

HOLDEN, J.

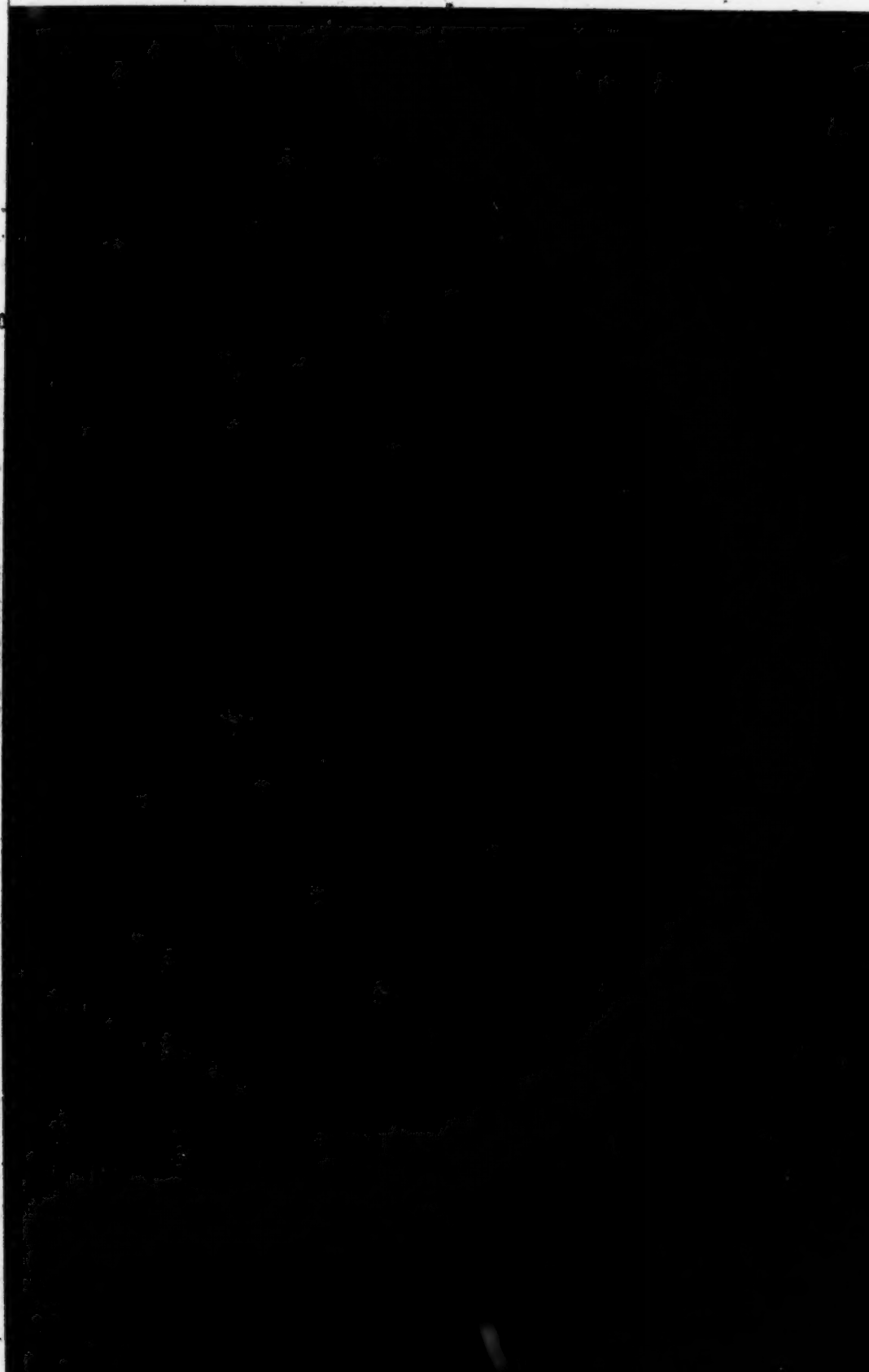
On December 18, 1963, the attorney for the plaintiff filed a motion to substitute parties plaintiff which, in effect, was a motion to revive.

Section 2311.34 of the Revised Code Laws of Ohio, provides that an order to revive an action in the name of the representative of the plaintiff shall not be made of right without the consent of the defendant after the expiration of one year from the time it might have first been made. The plaintiff in this case has no right to revive this case as a matter of right after December 24, 1962, because the records of the Probate Court of Franklin County, Ohio, show that the plaintiff died on December 24, 1961. The defendant in this case has indicated that it does not consent to the revivor.

For the reasons stated above, the motion of the plaintiff is overruled.

/s/ Henry L. Holden,
Judge.

APPEARANCES:
Mrs. Leda Hartwell,
Attorney for Plaintiff,
Vorys, Sater, Seymour and Pease,
Attorneys for Defendant,
Michigan Mutual Liability Co.



No. _____

IN THE

Supreme Court of the United States

October Term, 1966

HARRY S. KRAKOFF, ADMINISTRATOR OF THE ESTATE OF WILLIAM F. DONNELL,

Plaintiff-Appellant,

vs.

PAUL RUBLE WEAVER, MICHIGAN MUTUAL LIABILITY CO.,

Defendants-Appellees.

Appeal from the Supreme Court of the State of Ohio

MOTION TO DISMISS APPEAL

Appellee, Michigan Mutual Liability Company, moves the Court to dismiss the appeal herein on the following grounds:

I. The appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to the rules of the Supreme Court.

Rule 15 of the Supreme Court Rules, Section (i) provides that in an appeal from a State Court "there shall also be appended to the statement a copy of the order, judgment or decree appealed from." We do not find any such copy appended to the jurisdictional statement filed herein and it is impossible to tell the nature of the judgment from

which the appeal is taken. On page 10 of the Appellant's jurisdictional statement we find that on September 21, 1966 the Supreme Court of the State of Ohio refused to certify and that the motion for rehearing was denied on October 26, 1966. This statement correctly indicates that the Supreme Court of Ohio did not pass on the case on the merits. The appeal is not properly taken from the Supreme Court of Ohio but could only be taken from the judgment of the Court of Appeals of Franklin County which the Supreme Court of Ohio refused to review. *Randall v. Board of Commissioners*, 261 U. S. 252, 67 L. Ed. 637, 43 S. Ct. 252; *Mellon, Director General v. O'Neil*, 275 U. S. 212, 72 L. Ed. 245, 48 S. Ct. 62.

Furthermore, the construction of Section 2311.34 of the Revised Code of Ohio which Appellant claims violated the United States Constitution was made in the judgment of the Common Pleas Court in the year 1964 pursuant to the opinion which is denominated "decision" and is Appendix (C) of Appellant's statement. The Common Pleas Court refused to grant the representative of the plaintiff the right to revive the case because the application to revive was not made within the one year period of limitation set forth in Sec. 2311.34 of the Revised Code of Ohio. That decision was reviewed and affirmed by the Court of Appeals of Franklin County in 1965. The Supreme Court of Ohio overruled a motion to certify on May 19, 1965. (See Paragraph VI, page 9 of Appellant's statement.) Since this judgment was rendered in 1965 the appeal was not taken to this Court within the time allowed by law.

II. This appeal does not present a substantial federal question.

Appellant claims that he has been deprived of property without due process of law in violation of Amendment XIV

to the United States Constitution. Section 2311.34 of the Revised Code of Ohio sets up a limitation of one year within which a case can be revived by the plaintiff's personal representative after the death of the plaintiff. The Ohio Statute containing that limitation was first enacted in 1853, 51 Ohio Law 57, Section 411. Plaintiff did not seek to revive the action within the time permitted by this statute. In 1965 the Ohio Courts held that the statute of limitations had expired and refused to permit plaintiff to revive the case. We know of no case in which a one year statute of limitations has been held to be a violation of the United States Constitution and the Appellant cites none.

In 1966 the Ohio Courts held that since the procedure provided by Section 3929.06 of the Ohio Revised Code for the joining of an insurance company as a new party was initiated by the decedent, his personal representative had no independent right to initiate such a proceeding and could proceed only by revivor.

The right to join an insurance company as a new party defendant was one which did not exist in the absence of the statutes cited by Appellant and is not a right which arises under the Constitution of the United States. The construction of the Ohio Statutes does not involve a federal question.

No substantial federal question is presented.

It is therefore submitted that the appeal herein be dismissed.

Respectfully submitted,

Vorys, Sater, Seymour & Pease,
By /s/ James O. Seymour,
Attorneys for Appellee, Michigan Mutual Liability Insurance Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

KRAKOFF *v.* WEAVER ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1174. Decided May 22, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.